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Supreme Court of the United States

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October Term, 1971
No. 71-697

CORNWELL QUALITY TOOLS CO.,
Cross-Petitioner,

vs.

C.T.S. COMPANY, INC.,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION.

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Jurisdiction.

This Court does not now have jurisdiction to grant Cornwell's "Conditional Cross-Petition for Writ of Certiorari" because it was not timely filed.

Under 28 U.S.C. § 2101, a writ of certiorari "intended to bring a judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within 90 days after the entry of such judgment or decree". In the instant case, the judgment of the United States Court of Appeals in Cornwell's appeal, No. 24914, was entered on June 25, 1971. Hence the 90 day period provided by 28 U.S.C. § 2101 expired on September 23, 1971, approximately two months before the filing of Cornwell's conditional petition for a writ of certiorari.

While the filing by Cornwell of a petition for rehearing and/or the post entry modification of a judg-

ment could have operated to extend the time for petitioner's seeking a writ of certiorari, no such events have occurred in the instant case. With respect to the former method of extending time, a petition for rehearing does not operate to extend the time for filing a writ of certiorari except as to judgments which might be modified as the result of the granting of the petition. As stated in *Department of Banking v. Pink,* 317 U.S. 264, 266 (1942), the filing of a petition for rehearing extends the time to apply for a writ of certiorari "because it operates to suspend the finality of the . . . court's judgment pending the court's further determination whether the judgment should be modified so as to alter its adjudication of the rights of the parties". See also *United States v. Healy,* 376 U.S. 75, 77-80 (1964); *Foreman v. United States,* 361 U.S. 416, 426 (1960); *Pfister v. Northern Illinois Finance Corporation,* 317 U.S. 144, 149-150 (1942); Stern & Gressman, *Supreme Court Practice,* pp. 248-249, 4th ed. (1969).

Cornwell did not petition for rehearing in the Court of Appeals.[1] Indeed, Cornwell has sought no stay of mandate in connection with its appeal, the judgment of the Court of Appeals has been received by the District Court, and the hearing on the filing and spreading of

[1]On July 8, 1971, Cornwell filed a motion in the Court of Appeals to extend the time for the filing of a petition for rehearing. The affidavit of counsel for Cornwell in support of the motion stated that although he believed there were grounds upon which a rehearing could be sought, he was "uncertain as to whether the client [Cornwell] would desire such rehearing against the possibility of obtaining the same in view of the expense that would be involved therein". In fact, a petition for rehearing was never filed by Cornwell, and the docket entries of the Court of Appeals reflect advice by Cornwell's counsel to the court that Cornwell "will not file petition" and further that the "motion [for extension of time to file the petition for rehearing] is now moot".

judgment in Cornwell's appeal is presently scheduled for January 12, 1972. Although CTS did file a petition for rehearing in appeal No. 24969 (No. 71-608) in which CTS was appellant and Cornwell was appellee, the granting of that petition, if it had occurred, would not have had the effect of modifying the rights of the parties with respect to the judgment for which certiorari is here sought.

The appeal in which CTS filed its petition for rehearing, No. 24969, was a different appeal from that in which Cornwell now seeks certiorari, No. 24914. While the two appeals were consolidated for purposes of briefing and argument and the Court of Appeals handed down a single opinion covering both, the docket numbers were different, the issues presented by each were independent of those presented by the other, and the Court of Appeals rendered separate judgments in each. Moreover, the CTS petition for rehearing was directed solely to matters embraced within the judgment in No. 24969; nothing in the No. 24914 judgment was within its ambit.

So far as modification of a judgment is concerned, a modification does not operate to extend the time for filing for certiorari unless it "changes matters of substance, or resolves a genuine ambiguity in a judgment previously rendered". *Federal Power Commission v. Minneapolis-Honeywell R. Co.*, 344 U.S. 206, 211 (1952). No such modification occurred here.

Accordingly, this Court is without jurisdiction to consider the conditional cross-petition. We proceed, however, to show that the petition is unmeritorious.

Statement of the Case.

At trial, petitioner Cornwell, in response to CTS's antitrust claims, filed its own antitrust claims alleging that CTS conspired and attempted to monopolize in violation of Section 2 of the Sherman Act.[2] During the course of the pre-trial proceedings, Cornwell continually emphasized that its antitrust claim was a "defensive measure" designed to counter CTS's claims and that counsel had "no confidence" in Cornwell's claim [C.T. 1632-1656]. CTS, prior to trial, made a motion to dismiss Cornwell's claims under Rules 11 and 41b F.R.C.P. as sham [C.T. 1632-1656]. The trial court stated that it would grant the motion; counsel for Cornwell then made a plea to the court and suggested that his good faith as an attorney was being called into question, whereupon the court reversed itself and denied the motion [R.T. of Proceedings of May 6, 1968, pp. 4-12; C.T. 517]. Such was the background leading up to the trial.

Taken in the light most favorable to Cornwell, the evidence introduced or offered was as follows: CTS was not complying with Cornwell's wishes that it buy all of its merchandise from Cornwell including that merchandise as to which Cornwell merely purchased and resold to its distributors. Because of this, and for other reasons having to do with Cornwell's desire to enter the California market, CTS was terminated by Cornwell on May 19, 1964 as a distributor. CTS was then probationally reinstated after having pledged

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[2]During the course of discovery, Cornwell, in response to interrogatories, expressly qualified its allegation of conspiracy "to state that it is uncertain whether the competitor [Mac Tools] referred to [in the allegations] entered into any agreement with the defendant to foreclose plaintiff from making sales of hand tools to dealers in California and Nevada" [R.T. 2042-2045].

to Cornwell that it would seek to accommodate its operations to Cornwell's desires. It was at that time that CTS, being less than fully confident in Cornwell's continued good faith, sought an alternative source of supply and commenced negotiating with Mac Tools. It was CTS's intention to try to obtain a Mac distributorship with a view toward having a full line of professional mechanic's hand tools available to it in the event it was again terminated by Cornwell and to have two lines available in the event it was not. CTS talked to certain of its dealer customers about their receptivity to the Mac line during the period which intervened between May 19 and July 29, at which time CTS was again terminated by Cornwell.

No evidence was offered or received that any discussions or negotiations took place between CTS and Mac Tools which involved in any way either the termination of the relationship between CTS and Cornwell or the exclusion of Cornwell from the marketplace. No evidence was offered, and Cornwell did not contend at trial or in the Court of Appeals, that CTS terminated the relationship; all the evidence was to the contrary, *i.e.* that it was Cornwell which brought the distributorship to an end when it learned that CTS was interested in taking on the Mac line.

At trial, the situation that pertained to the presentation of Cornwell's case was very different from the circumstances under which CTS tried its case (which is the subject of the petition in No. 71-608). Cornwell did not make its offers of proof with regard to its antitrust claims in a summary form and it was afforded an opportunity to present by direct evidence from the witnesses, or by offering specific portions of depositions

on which it relied.[3] No evidence of any predatory acts or practices was alleged or offered by Cornwell. It was a total failure of proof on which the trial court directed verdicts against Cornwell on its antitrust claims.[4] In the Court of Appeals, Cornwell was also unable to point to the evidence of conspiracy or from which facts or inferences of a specific intent to injure Cornwell could be drawn.

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[3]Accordingly, Cornwell should be able to point out with particularity as to the precise evidence it relies upon to show either a conspiracy of any form aimed at Cornwell or an intention to injure Cornwell; its inability to do so flows from a failure of facts, not procedure.

[4]Two of the three exhibits here cited by Cornwell (on pages 4 and 5 of its Conditional Cross-Petition) as establishing that it proved its case were not even offered in evidence. As to Exhibit 19, a three volume deposition, Cornwell's counsel stated ". . . I withdraw my request that they be admitted into evidence to the jury" [R.T. 2202-2203]. Exhibit 38, another three volume deposition, was one which counsel claimed "that they themselves are cumulative"; they were not offered in evidence [R.T. 2480-2482].

ARGUMENT.

Petitioner here adopts the same strategy it sought to use in the trial court and in the Court of Appeals, namely to use claimed violations of the antitrust laws by CTS as a means to cloud the issues relating to CTS's claims. That is apparently the reason that Cornwell makes the cross petition for certiorari "conditional". Cornwell's claims could properly have been decided adversely to Cornwell at both the trial and the appeal court on the other offered facts without resort to the question of whether the requisite "specific intent" had been proved. Cornwell, in its conditional cross petition, cites to three exhibits (depositions) to support its claim that it established certain facts which were allegedly sufficient. It fails to note, however, that as to much of such evidence, it was either not offered or an independent evidentiary reason for excluding it existed.

Cornwell did not contend that CTS cut off Cornwell and the fact is that Cornwell cut off CTS twice in 1964 [R.T. 726, 2564-2565, 805-810; C.T. 1432-1433, 144]. Cornwell does not set forth any evidence or offer evidence which would establish that CTS and Mac Tools discussed CTS ceasing to do business with Cornwell or tying up all the dealers as part of its taking on the Mac line [R.T. 2104-2128, 2233-2235]. There was no offered evidence from which any exclusionary or predatory intent on the part of CTS could be shown or inferred. The evidence was that CTS turned to Mac Tools after having been momentarily cut off by Cornwell and when it feared being cut off again. CTS hoped to assure itself of one dealer line and felt that if Cornwell chose not to cut it off again, it would have two lines. The latter eventuality never

arose because Cornwell again terminated CTS on July 29, 1964.

At trial, Cornwell proceeded upon two factually inconsistent theories:

(a) That in June or July 1964 CTS entered into an agreement with a prospective supplier and principal competitor of Cornwell, namely Mac Tools, wherein it was agreed that CTS would cease doing business with Cornwell and instead carry the Mac line and arrange the switch in a manner which would result in CTS keeping and obtaining as many dealers as it could. There is no authority which Cornwell can cite suggesting that such conduct, if it had happened, would be illegal and the law is to the contrary. See *Amplex of Maryland, Inc. v. Outboard Marine Corporation,* 380 F.2d 112 (4th Cir. 1967), cert. den. 389 U.S. 1036 (1968); *Walker Dist. Co. v. Lucky Lager Brewing Co.,* 323 F.2d 1 (9th Cir. 1963); *Packard Motor Car Co. v. Webster Motor Car Co.,* 243 F.2d 418 (D. C. Cir. 1957), cert. den. 355 U. S. 822 (1957); *Schwing Motor Co. v. Hudson Sales Corp.,* 138 F. Supp. 899 (U.S.D.C. Md. 1956), aff'd *per curiam* 239 F.2d 176 (4th Cir. 1956), cert. den. 355 U.S. 823 (1957). There is little law relating to a seller cutting off a supplier since the shoe is usually on the other foot.

Alternatively, Cornwell argued:

(b) CTS (a non-manufacturing seller) entered into an agreement with Mac Tools to obtain the exclusive right to sell the Mac line while intending at the same time to keep the Cornwell line with a view toward maximizing its control of the dealer business. Since Cornwell argued that Snap-On Tools was by far the dominant company in the business, what could be

wrong with a wholesale distributor carrying two competitive lines even if there were two lines out of three. No authority is cited for the proposition that such conduct would be illegal. Since the record fails to establish that either (a) or (b), *supra,* happened, the issue is academic. One searches the record in vain for any concerted or unilateral exclusionary plan.

The record below revealed only that Cornwell complained because CTS refused to play into its hands and had the Mac Tools line arranged in advance of its being cut off; the subsequent competitive scramble for the dealers' business was the result of the termination of the relationship between the parties. When one strips away from Cornwell's contentions words like "conspiracy" and "foreclose" and "monopolize" and looks at the facts presented, Cornwell's case stands denuded. It is now what it was originally—an effort to cloud the issues so as to preclude CTS from obtaining a merits judgment on its antitrust case. Petitioner's case was a fact case on which it failed; it provides no basis for granting a writ of certiorari.

Conclusion.

The Conditional Cross-Petition for Writ of Certiorari should be denied.

Dated: December 23, 1971.

Respectfully submitted,

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